Petition

81-999

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ALEXANDER L. STEVAS,
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Case No.

In the Supreme Court of the United States

October, 1981, Term

Hawg-N-Action, Inc., a Colorado corporation,

v.

Petitioner,

Trustees of the Teamsters Construction Workers Local No. 13 Health and Welfare Trust Fund for Colorado, Trustees of the Colorado Teamsters Construction Workers Local No. 13 Vacation Fund, Trustees of the Construction Advancement Program, and Trustees of the Industry Advancement Program,

Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR CERTIORARI

GLENN A. BERGMANN, Esq.
431 West Colfax Avenue, Suite 340
Denver, Colorado 80204
(303) 623-1941

Counsel for Petitioner,
HAWG-N-ACTION, INC.

PETITION FOR WRIT OF CERTIORARI

I. Questions Presented for Review:

I. Whether the Petitioner, Hawg-N-Action, Inc., an excavation contractor, is liable to the Trustees of the Teamster Union Benefit Funds for payment of contributions for subcontractors' employees who were not covered by the Teamster contract, the agreement requiring only that Hawg-N-Action, Inc., require each subcontractor to sign a separate Teamster agreement.

II. Whether the Petitioner, Hawg-N-Action, Inc., an excavation contractor, is loable to the Trustees of the Teamster Union Benefit Funds for contributions for independent contract haulers who were not the employees of Hawg-N-Action, Inc.

II. Parties To The Proceeding Before The United States Court Of Appeals For The Tenth Circuit:

Trustees of the Teamsters Construction Workers Local No. 13 Health and Welfare Trust Fund for Colorado, Trustees of the Colorado Teamsters Construction Workers Local No. 13 Vacation Fund, Trustees of the Construction Advancement Program, and Trustees of the Industry Advancement Program,

Plaintiffs - Appellees,

v.

Hawg-N-Action, Inc., a Colorado corporation,

Defendant - Appellant.

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IV. Reports Of The Courts Below:

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B. United States Court of Appeals for the Tenth Circuit, No. 79-1675, dated June 17, 1981, 651 F.2d 1384. Appendix B.

V. Grounds For Jurisdiction United States Supreme Court:

(i) Judgment or decree sought to be reviewed: Opinion of the United States Court of Appeals for the Tenth Circuit affirming Judgment of the United States District Court for the District of Colorado, dated and filed June 17, 1981.

(ii) Order respecting a re-hearing: United States Court of Appeals for the Tenth Circuit order denying Appellant's Petition for Re-Hearing dated September 1, 1981.

(iii) Statutory provision confering jurisdiction on the United States Supreme Court: 28 U.S.C. 1254(1).

> 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS.
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) ....
>
> (3) ....

VI. Statement Of The Case

Hawg-N-Action, Inc., is a Colorado corporation formed in April, 1977. This corporation was formed by two men: John Lindt, the President, and Ken Legried, the Vice President, both of whom were experienced excavation contractors. The purpose of the corporation was to do excavation work for residential and commercial construction. The corporation had several pieces of excavating equipment and employed members of Operating Engineers Local No. 9 to operate the equipment and was signatory to a collective bargaining agreement with that union.

When the corporation was formed, it owned only three pieces of road-driven equipment: a "low boy," an "end dump," and the tractor to pull them. In seeking to employ a driver for the tractor, they [Lindt and Legried] made contract with an experienced truck driver named LeRoy Martin, who was a long-time acquaintance of both Lindt and Legried. As a condition of employment, Martin insisted that his pension benefits in the Teamsters Union be maintained. Lindt and Legried agreed to continue contributions for Martin and asked Martin to make contact with the union and make any necessary arrangements to make the contributions. Martin made initial contacts by telephone to the union and was advised that a "business agent" would call on the corporation. After a period of time passed and no business agent appeared, Martin again called the union hall and requested that a contract (collective bargaining agreement) be sent, as Lindt and Legried had advised Martin that there was no need to talk to a business agent, that all that was needed was the "paperwork" to implement benefit payments for Martin only.

A collective bargaining agreement was sent by mail to the corporation, and after approximately one week, the collective bargaining agreement with Teamsters Construction Workers Local No. 13 was signed by Legried and re-

turned to the union. Neither Lindt nor Legried read the entire agreement, understanding that it was necessary to the implementation of Martin's benefits, and with the intent that the corporation pay Martin's benefits solely, as the only driver employed by the corporation. There is a dispute in fact as to whether Martin advised the union of Lindt and Legried's intent, which was known by Martin.

The corporation made benefit contributions to the Teamster Benefit Funds during the period Martin was employed, approximately ninety days, and as one or two additional men were employed to drive the corporation equipment, contributions were made for them as well. When the corporation no longer had any employees driving corporation equipment, contributions were stopped. This was in approximately September, 1977.

Prior to the hiring of Martin and the signing of the collective bargaining agreement with Local No. 13 in May, 1977, the corporation had used independent contract haulers and subcontractors to haul away excess soil from excavation sites or to bring fill material if required. This was not work performed by the corporation as part of their excavation contract, or with corporation equipment, but was ancillary work performed for the general contractor on the site and co-ordinated by Hawg-N-Action, Inc. Neither the subcontractors nor the independent contract haulers were employees of Hawg-N-Action, Inc. All worked for a multiple of other industry contractors and were individual business entities, many of whom had worked with Lindt as subcontractors and independent contract haulers in prior years when Lindt had been the general superintendent and manager for a large excavation contractor. The subcontractors and independent contract haulers were not under the supervision of Hawg-N-Action, Inc., as employees and were called only to remove soil from, or bring in soil to specific locations in needed quantities.

The collective bargaining agreement signed by Hawg-N-Action, Inc., with Local No. 13 of the Teamsters Union in May, 1977, had been in effect since May 1, 1975, and expired by its terms on May 1, 1978. Though Hawg-N-Action, Inc., ceased to pay any contributions in September, 1977, the trustees of the benefit plans waited until after the expiration of the agreement in May, 1978, before making demand for audit and payment of contributions for the subcontractors and independent contract haulers who had worked for Hawg-N-Action, Inc.

Hawg-N-Action, Inc., denied liability for benefit contributions for the subcontractors and independent contract haulers who had not been employees of the corporation. A civil action pursuant to 29 U.S.C. 185 (1965) (Sect. 301), was filed in the United States District Court for the District of Colorado by the Trustees of the various benefit funds. After Judgment for the Trustees in the District Court, Hawg-N-Action, Inc., submitted an appeal to the United States Court of Appeals for the Tenth Circuit. Judgment of the District Court was affirmed by the United States Court of Appeals, and Petitioner Hawg-N-Action, Inc. seeks review.

VII. ARGUMENT FOR ALLOWANCE OF THE WRIT

Petitioner respectfully submits that this case is based on undisputed facts, to which conclusions of law have been applied in a way that takes it beyond the established principles of federal law to the degree that it requires review by this Court.

A. The decision of the District Court, affirmed by the Court of Appeals, enlarges and substantially changes the provisions of the Collective Bargaining Agreement relating to Subcontractors.

ARTICLE 18
Subcontractors

1. In order to protect the wages, working conditions and job opportunities of workmen employed under this Agreement, it is agreed that if the Contractor subcontracts any work on any construction project covered by this Agreement, such subcontract shall provide that the Subcontractor shall abide by all of the terms of this Agreement in performing such work for the duration thereof.

2. The subcontract shall further require the Subcontractor to sign an Agreement with the Union requiring the Subcontractor to make payments to the Health and Welfare Fund, the Pension Fund, the Vacation Fund and the Industry Funds referred to in Articles 26 and 27 of this Agreement. Such payments shall be made only for work performed on the particular project by the Subcontractor's Employees. Such payments shall be made to the same Trusts, in the same amounts, and upon the same terms and conditions as required of the Contractor under this Agreement.

This provision is unambiguous and is clear in its meaning. The District Court decision in categorizing the independent contractors fails to distinguish this provision from Article 25 of the Collective Bargaining Agreement.

ARTICLE 25
Truck Rental Conditions

1. When a Contractor rents or leases from one Owner not more than two units of equipment, fully manned and operated, of a type used for highway, heavy engineering, utility or building construction work covered by this Agreement, the following shall apply:

(a) The driver or drivers furnished by the Owner with such unit or units of equipment shall be permitted to man and operate the same without being referred from the Union hiring hall and out-of-work list.

(b) The Owner shall provide and have sole responsibility for fuel, oil, grease, tires, tubes, repairs and other items necessary to operate such equipment safely as required by all laws and regulations.

(c) Separate checks shall be issued by the Contractor for (1) the drivers' hourly wages in accordance with the provisions of this Agreement relating to employees and all applicable payroll deductions such as federal and state taxes, FICA, etc.; (2) for all fringe benefit contributions due to be paid in behalf of such drivers; and (3) for the use, rental or lease of such Owner's equipment. The Contractor shall not deduct from such use, rental or lease payments due to the Owner any of the aforesaid items in subparagraphs (1) and (2) of this paragraph (c), nor any charges for bookkeeping or for issuance of the above checks.

(d) The Contractor shall pay all applicable contributions to the respective fringe benefit and industry fund trusts referred to in this Agreement on a straight time basis for all hours worked by such drivers.

(e) Each driver shall be subject to compliance with the security clause and shall be covered by all other terms and provisions of this Agreement which are applicable to any other employee covered by this Agreement.

2. All truck hauling work shall be on an hourly rental rate unless mutually agreed otherwise and not in violation of any federal, state or local laws, rules or regulations.

3. When no weighing facilities are available, an average yardage load or hourly guarantee shall be reached by a representative of the Contractor and the Owner.

4. Truck owner-operators as hereinabove referred to shall not be required to furnish specialty equipment such as batch boards, tarpaulins, etc. When specialty jobs require such equipment, the Contractor shall furnish same. Reasonable deposit may be requested from the truck owner turns in such specialty equipment in the same condition as received, ordinary wear and tear excepted.

In affirming the Decision, the Court of Appeals, extended the obligation of the Petitioner to pay benefit contributions for the hours worked by sub-contractor's employees, reasoning that this would be the measure of damage to the trustees and second that the Trustees would have no other remedy.

Petitioner submits that the reconstruction of the Contract is impermissible, absent an ambiguity, and that the Collective Bargaining Agreement itself provides an effective initial remedy in Article 28, Trust Fund Delinquencies, paragraph (G).

ARTICLE 28

Trust Fund Delinquencies

(G) If any of said Boards of Trustees makes a determination that the Contractor is delinquent in timely furnishing reports in proper form or in timely

making payment of contributions or in failing to comply fully with any of the provisions of the applicable Trust Agreement or with any rules, regulations or eligibility requirements of such Trust, then, in addition to the foregoing provisions of this Article, *the Union thereafter may refuse to furnish any workmen or employees to such delinquent Contractor and/or may direct workmen or employees employed by such delinquent Contractor to cease working and/or may impose economic or other legal sanctions against such delinquent Contractor, and any such action by the Union shall not be deemed to be in violation of the no-strike or no-work-stoppage provisions set forth in Article* R *of this Agreement;* provided, however, any employees so withdrawn or refusing to perform any work as herein provided shall not lose their status as employees but no such employee shall be entitled to claim or receive any wages or other compensation for any period during which he has been so withdrawn or refused to perform any work; provided, further, however, the provisions of this paragraph (G) shall not be applicable to the Board of Trustees of either Industry Advancement Program or the Construction Advancement Program. [emphasis added]

In *Quad Construction, Inc., a Wyoming Corporation v. Wm. A. Smith Contracting Co. Inc.,* 534 F.2d 1391, 1394 (1976) the Court of Appeals for the Tenth Circuit determined:

> The courts interpret contracts as made by the parties and do not make new ones for them. *Yamin v. Levine,* 130 Colo. 35, 206 P.2d 596, 597.

And later, in *Williams Petroleum Co. v. Midland Cooperatives, Inc.* 539 F2d 694, 696

> And of particular application here is the rule that courts will not make a better contract for the parties than that which they have seen fit to enter into, nor may the courts alter a contract for the benefit of one party and to the detriment of another. *Great Western Oil Company v. Mitchell*, 326 P.2d 794 (Okla. 1958)

In conjunction with the undisputed finding of fact by the District Court that this agreement came into being solely as a result of a unilateral mistake by the Petitioner, there is the rule that a contract will be construed against the party who drafted it. *B.A. Mortgage Company, Inc. v. Unisal Development, Inc.*, 469 F.Supp. 1258, 1264.

Petitioners mistake, in signing, without reading the agreement, does not make the Petitioner culpable to an additional degree that justifies reconstruction of the Agreement in the absence of an ambiguity. The District Court found that the intent of the Petitioners' officers Lindt and Legried was clearly to provide benefits for a single employee [Martin], and that their actions were consistent with this intent. The total absence of contact between petitioner and Teamster Local 13, before signing, at the time of signing, and during the term of the Agreement, as well as after expiration, removes the possibility of any disagreement between the parties as to the meaning of any provision of the Agreement that would justify restructuring.

B. Neither the Independent Contract Haulers, or the Sub-Contractors used periodically by the Petitioner were employees of the Petitioner except by definition within the Collective Bargaining Agreement, as applied by the Trustees, retroactively, following expiration of the agreement.

In a case decided by the United States Court of Appeals for the Ninth Circuit, in May 1981, an excavating contractor, signatory to a Master Labor Agreement (MLA),

used independent owner-operators, when its own equipment or employees were unavailable. The Trustees of Union Benefit Funds, sought to collect benefit contributions for the hours worked by the independent owner-operators. The Court applied a multi-factor test to distinguish an independent owner-operator from an employee of the signatory employer. The Court ultimately determined that the signatory excavating contractor was not the employer, but was liable for contributions because the Master Labor Agreement required the signatory employer to do the work with its own employees, a requirement that is not present in the case at hand. In the Ninth Circuit decision the Court in examining the status of a specific independent contractor states:

> [4] The district court found that Frank Sandoval was also an independent contractor and as such could not be considered an employee of Northwest. Under the Restatement guidelines set forth above, this conclusion is correct. Sandoval owns his business and has other customers besides Northwest. Sandoval sets his own hours and billing rates and is not supervised by any of his customers, including Northwest, except to the extent that the customer dictates what it wants accomplished. Although Northwest does lease its fully-equipped facilities to Sandoval, who drives a truck insured and owned by Northwest, there is no evidence that Northwest controls or has the power to control Sandoval who ran his own heavy duty repair business for over four years before acquiring Northwest as a customer. Accordingly we affirm the district court's finding that Sandoval was an independent contractor.
>
> *Waggoner v. Northwest Excavating, Inc.* 642 F.2d 333 (1981)

The Petitioner's evidence presented at trial and acknowledged in the findings of fact by the District Court

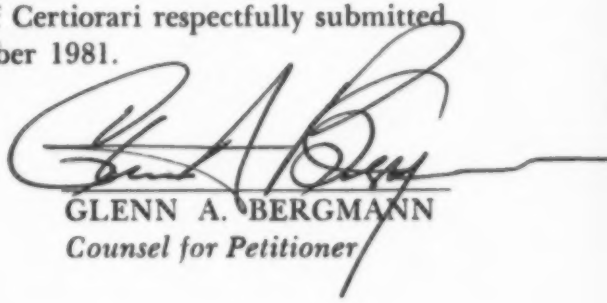
consistently met the tests as set forth in *Waggoner* (supra). In addition to this fact the petitioner is primarily engaged in a part of the construction industry not claimed or under the jurisdiction of Teamster Local 13, a position that is totally consistent with the use of independent contractors to perform work requiring specialized equipment [trucks] belonging to the independent contractor, and not the type of equipment owned by the Petitioner, in its regular business.

C. There is no allegation or intimation that the Petitioner had any economic advantage in the use of independent contract haulers. The individual haulers, as well as the sub-contract haulers who had multiple pieces of equipment, negotiated full, competitive market level rates with the Petitioner for any work performed. The Petitioner paid the negotiated rates in full. Any subsequent assessment of additional benefit contributions, to be pad by the Petitioner, create a substantially increased, unrecoverable cost to the Petitioner, without a benefit to any of the persons whose work hours, pursuant to decision of the District Court, create the obligation. This case goes well beyond the perimeters of *Walsh v. Schlecht*, 429 U.S. 401, 97 S.Ct. 679, 50 L.Ed.2d 641 (1977). The case at hand is a prime example of the circumstance set forth in the final paragraph of Justice White's dissent in *Walsh*.

> "I do not understand why the Court feels such compulsion to save the contract by construing it to mean that the payments at issue are not for the benefit of the contractor's employees at all and are not made on their behalf. The result of this construction is that in addition to the full contract price paid to the subcontractor, petitioner must pay into the trust funds 96 cents for each jobsite hour worked by the subcontractors employees, these funds to be held for the employees of the contributing employers but excluding

the subcontractor's employees. This is simply a penalty for employing a nonsignatory cubcontractor, a penalty the Court creates in construing the contract as it does. With all due respect. I dissent and would reverse the judgment below."

Petition for Writ of Certiorari respectfully submitted this 25th day of November 1981.



GLENN A. BERGMANN
Counsel for Petitioner

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 78-C-750

Trustees of the Teamsters
Construction Workers Local No. 13
Health and Welfare Trust Fund for
Colorado,
Trustees of the Colorado Teamsters
Construction Workers Local No. 13
Vacation Fund,
Trustees of the Construction
Advancement Program, and
Trustees of the Industry
Advancement Program,

Plaintiffs,

v.

Hawg N Action, Inc., a
Colorado corporation,

Defendant.

Ms. Pamela A. Martin, Attorney at Law, of the firm, Gorsuch, Kirgis, Campbell, Walker and Grover, 1200 American National Bank Building, Denver, Colorado 80202, for Plaintiffs; Mr. Glenn A. Bergmann, Attorney at Law, 3615 South Tamarac, Denver, Colorado 80237, for Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PRELIMINARY STATEMENT

This matter came on for trial before the Court on May 31, 1979.

The plaintiffs are trustees of certain benefit funds paid by employers pursuant to collective bargaining agreements with the Colorado Teamsters Construction Workers Local No. 13. The trustees by this action seek to recover from defendant contributions claimed by the plaintiffs to be due from the defendant under a collective bargaining agreement with Local No. 13. The defendant denies liability.

FINDINGS OF FACT

Prior to April 1977, John Lint and Ken Legried were engaged in excavation and earth work for residential and commercial construction. Both had many years of experience in this type of work.

In April 1977, they caused the defendent to be incorporated to engage in excavation and earth work for residential and commercial construction. Lint was President and Legried, Vice-President of the defendent.

The operating equipment owned by the defendant at the time consisted of a "low-boy" and "end dump" and a tractor used to pull them. Consequently, the defendant needed but one truck driver to operate the defendant's equipment. If additional equipment was needed, defendant hired, on an hourly basis, non-union "independent contract haulers" who would furnish a truck and driver for the agreed hourly rate. The hourly rate was a flat amount from which the contract hauler would pay all expenses of the operation and maintenance of the truck and the driver's compensation.

Shortly after the defendant began its operations, one Clarence Martin, a member of Local Union No. 13, who had known both Lint and Legried for some time, sought employment as a truck driver. In the course of pre-employment discussions, Martin advised Lint and Legried that he would insist that his union benefits be protected. This required that the defendant enter into a "pre-hire" collective bargaining agreement with Local Union No. 13. Lint and Legried agreed that the defendant would be willing to make the required contributions to the union's benefit funds resulting from Martin's employment and told Martin to contact the union and arrange for the necessary paper work required to accomplish this.

At this time, Lint and Legried believed that a collective bargaining agreement of this type did not include "independent contract haulers" as employees of the defendant.

Martin, by telephone, advised Local No. 13 that the defendant desired a contract with the union. The union advised Martin it would send a business agent to negotiate an agreement. Lint and Legried told Martin they didn't want to negotiate; that all they wanted was a contract so they could make the benefit payments to the union to protect Martin's rights to benefits from the union trust funds. After more telephone contacts, the union sent the defendant a proposed contract, which neither Lint nor Legried read. After keeping the contract about a week, the defendant executed the contract and returned it to the union and thereafter paid the union the benefit contributions resulting from Martin's employment.

At no time during his conversations with the union did Martin advise the union of the purpose of the agreement nor did he discuss with the union the status of independent contract haulers under the union's collective bargaining agreement.

Neither Lint nor Legried, prior to the execution of the agreement, contacted the union or discussed with it the terms and effect of the collective bargaining agreement.

As time went on, the defendant acquired additional equipment of its own and hired additional truck drivers to operate it. The defendant recognized these additional employees as employees covered by the collective bargaining agreement and paid the resulting benefit contributions to the union; but at no time did the defendant report "independent contract haulers" or subcontractors as employees of the defendant.

The union agreement became effective May 1, 1977, and expired May 1, 1978. During this one-year period, the operations of the defendant grew substantially and defendant grew substantially and defendant continued the practice of using "independent contract haulers' without reporting them as employees covered by the agreement.

In April 1978, the trustees caused an audit to be made of the defendant's records and subsequently made demand for payment of contributions for all of the independent contract haulers in addition to the defendant's own employees. It was not until the audit and demand that Lint and Legried became aware of the union's claims that independent haulers were covered by the collective bargaining agreement.

Article 25 of the collective bargaining agreement provides in its pertinent parts:

> "1. When a Contractor rents or leases from one Owner not more than two units of equipment, fully manned and operated, of a type used for highway, heavy engineering, utility or building construction work covered by this Agreement, the following shall apply:
>
> • • •

"(c) Separate checks shall be issued by the Contractor for (1) the drivers' hourly wages in accordance with the provisions of this Agreement relating to employees ; (2) for all fringe benefit contributions due to be paid in behalf of such drivers; and (3) for the use, rental or lease of such Owner's equipment .

* * *

"(d) The Contractor shall pay all applicable contributions to the respective fringe benefit and industry fund trust referred to in this Agreement on a straight time basis for all hours worked by such drivers."

Article 18 of the collective bargaining agreement provides in essence that if a contractor subcontracts any work on any construction project covered by the agreement, that the subcontract shall require the subcontractor to sign an agreement with the union requiring the subcontractor to make payments to the trust funds in the same amounts as required of the contractor under its agreement with the union.

The Court further finds that the collective bargaining agreement is valid and its provisions are binding upon the parties thereto.

The Court further finds the plaintiffs are entitled to recover from the defendant under the collective bargaining agreement, the following amounts:

1. Contributions to the trust funds	$15,856.33
2. Liquidated damages	1,610.13
3. Audit fees	697.76
4. Attorneys fees, which the Court finds from the evidence to be reasonable for the services performed by plaintiffs' attorney	7,000.00
TOTAL	$25,164.22

The Court finds from the evidence that plaintiffs are not entitled to recover interest on any of the foregoing amounts prior to the entry of judgment herein.

CONCLUSIONS OF LAW

1. The defendants intent to enter into a collective bargaining agreement that would cover only those employees directly employed by the defendant did not vitiate the terms of the collective bargaining agreement as executed by the defendant inasmuch as that intent was not communicated to the union by the defendant prior to the execution of the collective bargaining agreement.

2. The collective bargaining agreement executed by the defendant is a valid agreement and binding upon the parties thereto.

3. Those instances in which the defendant hired, rented or leased not more than two units of equipment from one owner are covered by Article 25 of the collective bargaining agreement and the defendant is obligated to pay the plaintiffs' contributions to the respective fringe benefit and industry funds in an amount computed in the manner set forth in the collective bargaining agreement.

4. Those instances in which the defendant hired. rented or leased more than two units of equipment from one owner for use on a particular project are covered by Article 18 of the collective bargaining agreement and the defendant is liable to the plaintiffs for contributions to the trust funds which the subcontractor should have made under Article 18.

5. That the plaintiff is entitled to judgment against the defendant in the total amount of $25,164.22, together with the plaintiffs' costs to be taxed by the Clerk of the Court upon the filing of a bill of costs.

ORDER

IT IS ORDERED that judgment be entered forthwith in favor of the plaintiffs and against the defendant in the amount of $25,164.22, together with plaintiffs' costs to be taxed by the Clerk of the Court upon the filing of a bill of costs.

Entered this 7th day of June, 1979.

BY THE COURT:

s/s HATFIELD CHILSON

Hatfield Chilson
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 78-C-750

Trustees of the Teamsters
Construction Workers Local No. 13
Health and Welfare Trust Fund for
Colorado,
Trustees of the Colorado Teamsters
Construction Workers Local No. 13
Vacation Fund,
Trustees of the Construction
Advancement Program, and
Trustees of the Industry
Advancement Program,

Plaintiffs,

v.

Hawg N Action, Inc., a
Colorado corporation,

Defendant.

JUDGMENT

In accordance with the Court's Order this day entered, judgment is hereby entered in favor of the plaintiffs and against the defendant in the amount of $25,164.22, together with plaintiffs' costs to be taxed by the Clerk of the Court upon the filing of a bill of costs.

Entered this 7th day of June, 1979.

BY THE COURT:

Senior United States
District Judge

Appendix B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 79-1675

Trustees of the Teamsters Construction Workers Local No. 13, Health and Welfare Trust Fund for Colorado, Trustee of the Colorado Teamsters Construction Workers Local No. 13, Vacation Fund, Trustees of the Construction Advancement Program, and Trustees of the Industry Advancement Program,
Plaintiffs-Appellees,

v.

Hawg N Action, Inc., a Colorado corporation,
Defendant-Appellant.

Appeal from the United States District Court for the District of Colorado (D.C. CIV No. 78-C-750)

Pamela M. Martin (Eve M. Hernquist with her on the brief), of Gorsuch, Kirgis, Campbell, Walker and Grover, Denver, Colorado, for Plaintiffs-Appellees.

Glenn A. Bergmann, Denver, Colorado, for Defendant-Appellant.

Before HOLLOWAY, McWILLIAMS, and McKAY, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is a civil action brought by the trustees of certain employer-union trust funds against Hawg-N-Action, Inc., a Colorado corporation. The claim is that the defendant, Hawg-N-Action, failed to make certain contributions into the several trust funds as required by a pre-hire agreement between it and the Colorado Teamsters Construction Workers Local No. 13.[1] Trial was to the court, and resulted in a judgment in favor of the trustees and against the defendant in the amount of $25,164.22 and costs. The defendant appeals.

The background facts are not in dispute. Prior to April 1977, John Lint and Ken Legried were engaged in excavation and earth work for residential and commercial construction. Both had many years of experience in this type of work. In April 1977, Lint and Legried formed a corporation known as Hawg-N-Action, which, as the name might suggest, was formed for the purpose of conducting such excavation and earth work. Lint served as president, and Legried as vice-president of the company.

The defendant owned but three pieces of equipment at the time of its incorporation, namely, a "low-boy' and an "end dump," and a tractor to pull them. The defendant needed only one truck driver, consequently, to operate its equipment. The defendant intended to hire, on an hourly basis, non-union "independent contract" haulers, who would furnish a truck and a driver for an agreed hourly rate, when it needed additional equipment. The defendant also proposed to subcontract some of its work.

Shortly after the defendant began its operations, Leroy Martin, a member of Local Union No. 13, who had known both Lint and Legried for some time, sought employment with the defendant company as a truck driver. Martin

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[1]This action arises under Section 301 of the Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §185 (1976).

insisted from the outset that his union benefits be protected. Such would require that the defendant enter into a pre-hire collective bargaining agreement with Local No. 13. The defendant was desirous of employing Martin, and on behalf of the defendant, Lint and Legried agreed that the company would make all required contributions to the union's benefit funds resulting from Martin's employment. In this regard, Lint and Legried simply told Martin to contact the union and arrange for the necessary paperwork. It is not in dispute, and the District Court so found, that Lint and Legried only intended to pay contributions for Martin.[2]

Martin contacted union officials and advised them that the defendant desired a contract with the union. The union indicated it would have a business agent contact the defendant and negotiate an agreement. Lint and Legried, in turn, informed Martin, who was cast in the role of an intermediary, that they didn't need to see any business agent, and that all they wanted was a contract so that they could make the benefit payments to the union in order to protect Martin's rights. *Martin did not advise the union officials of the reason for the defendant's request for a union contract.* After several additional telephone calls between Martin and the union, the union sent the defendant a proposed contract, which was a copy of the then current 1975-1978 Teamsters Construction Workers Local Union No. 13, Highway, Heavy Engineering, Utility, and Building Construction Agreement.

The proposed contract was a comprehensive document, consisting of some 57 pages. Neither Lint nor Legried, however, read the proposed agreemnt with the union. Therein lies the root of the present controversy.

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[2]At trial, John Lint testified that at that time Martin was the only driver in Hawg N Action's employ, thereby precluding any confusion as to the employees covered by the agreement.

After keeping the contract for about a week, Legried signed the contract and returned it to the union, assuming, as he testified, that it only covered Martin. The effective date of the contract was May 1, 1977, and, by its terms, it expired on May 1, 1978.

Thereafter, the defendant commenced to pay the contributions required as a result of Martin's employment. When the defendant later hired additional truck drivers, the defendant did recognize that these new employees were also covered by the agreemnt with th union and paid the benefit contributions required by their employment. In the meantime, the defendant continued to use "independent contract" haulers and subcontractors, and the defendant did *not* make any contributions in connection with their work. The trustees of the various trust funds later found out that the defendant had *not* been making contributions in connection with its use of independent contractors and subcontractors, and the present controversy arose.

As we understand it, there is no contention, in this Court, at least, that there never was a valid agreement between the union and the defendant, *event though there was an obvious, and grievous, misunderstanding on the part of the defendant when its vice-president signed the contract submitted to it by the union.* The mistake, however, was unilateral and solely the fault of the defendant. In this setting, then, the defendant's initial position is that the agreement itself does not require the contributions which the trustees claim.

I. Subcontractors

As above indicated, the defendant performed some of its work through the use of subcontractors. Article 18 of the agreement between the defendant and the union relates to subcontractors and the pertinent parts thereof are

set forth as Appendix "A." In essence, Article 18 provides that if the defendant subcontracts any of its work the subcontract shall provide that the subcontractor shall abide by all of the terms of the agreement between the defendant and the union. More specifically, paragraph 2 of Article 18 declares that any subcontract shall require the subcontractor to make payments to the various trust funds here involved.

It is undisputed that none of the subcontracts entered into by the defendant required the subcontractor to make payments to the employer-union trust funds. So, defendant's breach of its agreement with the union is well established. In such circumstance, the only remaining matter is the measure of damages. In this regard, it would appear that the trustees are entitled to damages in a sum equal to that which they would have received if the agreement between the defendant and the union had been fully performed by all parties.[3]

The defendant argues that though it agreed to require any subcontractor to make payments into the trust funds, it did not agree to make such payments if the subcontractor failed to do so. In this manner, the defendant attempts to distinguish this case from Walsh v. Schlecht,

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[3]The district court found that the plaintiffs were entitled to recover a total of $25,164.22 under the collective-bargaining agreement plus costs from the defendant. This sum is comprised of $15,856.33 in contributions to the trust funds, and additionally, $1,610.13 in liquidated damages; $697.76 in audit fees; and $7,000 in attorney's fees. The Supreme Court has stated that damages attributable solely to an employer's breach of contract should not be charged to the union. *Vaca v. Sipes,* 386 U.S. 171, 197 (1967). This Court has held, more specifically, that in the collective bargaining context the compensatory damages for a breach should be such as will place the injured party in the same financial position in which he would have been had the contract not been breached. International Br. of El. Wkrs. v. A-1 El. Serv., 535 F.2d 1, 3 (10th Cir.), *cert. denied,* 429 U.S. 832 (1976); *See also A To Z Rental Inc. v. Wilson,* 413 F.2d 899, 908 (10th Cir. 1969).

429 U.S. 401 (1977). We are not impressed with this attempted distinction. To accept this particular argument would mean that the trustees would have no remedy for defendant's undisputed breach of contract.

Walsh v. Schlecht deserves comment. In *Walsh* the collective bargaining agreement provided that when an employer who was a signatory to the agreement subcontracted work he must either (1) require the subcontractor to be bound by the agreement or (2) be himself liable for payments to certain employer-union trust funds. The employer there involved did neither, and the trustees brought suit in the state courts of Oregon. The trustees prevailed, and the Supreme Court of Oregon affirmed on the issue of liability. On certiorari, the United States Supreme Court affirmed.[4]

The issue in *Walsh,* which is not present in the instant case, was whether the agreement required the employer to make payments "on behalf of" or "for the benefit of" the subcontractor's employees, or, on the other hand, simply required the employer to make contributions to the funds "measured" by the hours worked by the subcontractor's employees. If the former, such would have violated Section 302(a)(4) of the Labor Management Relations (Taft-Hartley) Act (1947), 29 U.S.C. § 186(a)(1). The Supreme Court held, however, that such payments were simply measured by the hours worked by the subcontractor's employees and enforced the agreement there

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[4]The Supreme Court of Oregon did reverse the Circuit Court's opinion in part. The United States Supreme Court summarized this action in its affirming opinion as follows: "The Supreme Court of Oregon affirmed the judgment insofar as it sustained the demurrer to the petitioner's defense based on §302(a)(1) but construing the subcontractor's clause as giving all the 'funds . . . equal standing under the terms of the contract . . . ,' reversed the judgment insofar as it limited the accounting to the Apprenticeship and CIAF trusts." 429 U.S. at 406.

involved, notwithstanding the fact that the subcontractor's employees did not benefit from such payments and that such payments ultimately benefited only the employees of the employer and other signatory employers So, in the instant case, the fact that the employees of the subcontractor will not benefit from the payments into the trust funds does not render the agreement unenforceable.

As indicated, we recognize that the bargaining agreement in *Walsh* did specifically provide that the signatory employer was liable if the subcontractor did not make the payments. If such a clause were in the instant agreement, it would appear that Hawg would have no defense. The absence of such a clause, however, in our view, is not fatal. The agreement did specifically provide that Hawg should *require* the subcontractor to sign an agreement with the Union to make payments into the various employer-union trust funds. Hawg breached this provision in the agreement, and is now simply called upon to respond in damages for its breach. The relevance of *Walsh* to the instant controversy is that Hawg may not avoid the agreement merely because the subcontractor's employees will not benefit by Hawg's payments measured by the hours worked by the subcontractor's employees. *See also Kreindler v. Clarise Sportswear Co.*, 184 F.Supp. 182, 184 (S.D. N.Y. 1960).

II. Independent Contractors

The defendant also performed part of its work by renting or leasing equipment which was operated by the lessor, or his employee. In an effort to escape liability under the agreement for work done by such owner-operators, de-

fendant characterizes them as independent contractors.[5] Such characterization is not determinative of the problem.

Article 25 of the agreement between the defendant and the union, in pertinent part, is set forth as Appendix "B." It provides that when the defendant rents or leases from one owner not more than two units of equipment, fully manned and operated, the defendant shall pay all applicable contributions to the trust funds referred to in the agreement on a straight time basis for all hours worked by such driver.

It is undisputed that defendant performed a part of its work by renting or leasing fully manned equipment, and that it did not make the payments called for by Article 25. In this regard, then, the breach of contract and resulting damage were clearly established.[6]

III. Repudiation, Laches, and Estoppel

It would appear that the defendant made trust fund payments covering Martin's employment, and that of additional employees whom defendant later hired, for several months, and then stopped making further payments. Based on this, the defendant in this Court argues that the defendant repudiated the agreement, and that the trustees are barred from recovery on the basis of estoppel and

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[5]The defendant described such "independent contract haulers" at trial and in its brief as separate and distinct business entities who work for a variety of customers of their own choosing, pay their own expenses, own their own equipment and maintain separate accounts.

[6]In regard to the breach of the agreement under both Article 18 and Article 25, we note that Article 28, which provides for Trust Fund Delinquincies, states that each failure to file a monthly report of work hours and each failure to timely pay monthly contributions constitutes a separate and distinct violation of the Trust Agreement for which the union is entitled to damages and costs.

laches.[7] As far as we can ascertain, none of these matters was ever raised in the trial court. Such were not pled by the defendant in its answer, and were not contained in the pretrial order. Nor can we find that the issues were tried with consent of the parties. For example, counsel, by way of closing argument to the trial court, did not present these matters to the trial court for resolution. And the trial court did not make findings or conclusions on these issues. Such being the case, we are not going to come to grips with these questions for the first time on appeal. Generally speaking, an appellate court will not consider an appeal issues never raised in the trial court. *Neu v. Grant,* 548 F.2d 281, 287 (10th Cir. 1977). By thus disposing of the defendant's claim of repudiation, estoppel and laches, we do not wish to be understood as in any way indicating that any of these matters has real merit. In our view, they do not.

Judgment affirmed.

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[7]Specifically, the defendant claims that assuming *arguendo* that it was obliged to make the contributions to the trust funds, it repudiated the contract by failing to make such payments and the lack of receipt thereof by the union constituted sufficient notice of Hawg N Action's repudiation. Additionally, the defendant argues that the union should be barred from bringing this action on the ground of laches because Hawg N Action ceased paying contributions in July, 1977, but the union did not request an audit until April, 1978.

APPENDIX "A"
ARTICLE 18
Subcontractors

1. In order to protect the wages, working conditions and job opportunities of workmen employed under this Agreement, it is agreed that if the Contractor subcontracts any work on any construction project covered by this Agreement, such subcontract shall provide that the Subcontractor shall abide by all of the terms of this Agreement in performing such work for the duration thereof.

2. The subcontract shall further require the Subcontractor to sign an Agreement with the Union requiring the Subcontractor to make payments to the Health and Welfare Fund, the Pension Fund, the Vacation Fund and the Industry Funds referred to in Articles 26 and 27 of this Agreement. Such payments shall be made only for work performed on the particular project by the Subcontractor's Employees. Such payments shall be made to the same Trusts, in the same amounts, and upon the same terms and conditions as required of the Contractor under this Agreement.

APPENDIX "B"
ARTICLE 25
Truck Rental Conditions

1. When a Contractor rents or leases from one Owner not more than two units of equipment, fully manned and operated, of a type used for highway, heavy engineering, utility or building construction work covered by this Agreement, the following shall apply:

* * *

(d) The Contractor shall pay all applicable contributions to the respective fringe benefit and industry fund trusts referred to in this Agreement on a straight time basis for all hours worked by such drivers.

Appendix C

JULY TERM – September 1, 1981

Before Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, and Honorable Monroe G. McKay, Circuit Judges

Trustees of the Teamsters Construction Workers Local No. 13, Health and Welfare Trust Fund for Colorado, Trustee of the Colorado Teamsters Construction Workers Local No. 13, Vacation Fund, Trustees of the Construction Advancement Program, and Trustees of the Industry Advancement Program *Plaintiffs-Appellees,* *v.* Hawg-N-Action, Inc., a Colorado corporation, *Defendant-Appellant.*	No. 79-1675

This matter comes on for consideration of appellant's petition for rehearing, as corrected, and motion to file the petition out of time.

Upon consideration whereof, appellant's motion to file petition for rehearing out of time is granted.

It is further order that appellant's petition for rehearing is denied.

HOWARD K. PHILLIPS,
Clerk
By ROBERT L. HOECKER
Chief Deputy Clerk

APPENDIX "D"

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT
29 U.S.C.

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties (Sect. 301).

APPENDIX "E"
28 U.S.C.

§ 1254. Court of appeals certiorari appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, § 1, 62 Stat. 928.)

Opposition

Office - Supreme Court, U.S.
FILED
JAN 15 1982
ALEXANDER L. STEVAS,
CLERK

Case No. 81-999

In the Supreme Court of the United States

October Term, 1981

Hawg-N-Action, Inc., a Colorado corporation,

Petitioner,

v.

Trustees of the Teamsters Construction Workers Local No. 13 Health and Welfare Trust Fund for Colorado, Trustees of the Colorado Teamsters Construction Workers Local No. 13 Vacation Fund, Trustees of the Construction Advancement Program, and Trustees of the Industry Advancement Program,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

John S. Pfeiffer,
Counsel of Record for Respondents
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1200 American National Bank Building
818 Seventeenth Street
Denver, Colorado 80202
(303) 534-1200

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts below correctly held that an employer, which was obligated by contract to require its subcontractors to agree to make payments to employee benefit funds, should be liable to the funds' trustees for its breach of that obligation.

2. Whether the courts below correctly held that an employer, which was obligated by contract to treat certain individuals as employees and to make payments to employee benefit funds on their behalf, should be liable to the funds' trustees for its breach of that obligation.

PARTIES TO THE PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The caption of the case in this Court contains the names of all such parties; the names of all such parties are also correctly listed in the Petition at page i.

CITATIONS TO OPINIONS AND JUDGMENTS BELOW

1. The judgment of the United States District Court for the District of Colorado (Pet. App. A) is unreported.

2. The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. B) is reported at 651 F.2d 1384.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit filed its opinion on June 17, 1981; the Petition for Re-Hearing was denied on September 1, 1981. Petitioner filed its Petition for

Writ of Certiorari on November 25, 1981, invoking the jurisdiction of this Court under 28 U.S.C. §1254(1) (which, in pertinent part, is reproduced at Pet. iv).

STATEMENT OF THE CASE

This controversy arose from the Respondents' efforts, as third-party beneficiaries, to enforce certain provisions of a collective bargaining agreement between Petitioner and Teamsters Construction Workers Local Union No. 13 ("the Union"). The nature and the history of Petitioner, Hawg-N-Action, Inc. (hereinafter sometimes referred to as "Hawg") are amply described in the Petition. By way of background, Respondents (hereinafter sometimes called "the Trustees") administer four trust funds. Two of these funds — the Teamsters Construction Workers Local No. 13 Health and Welfare Trust Fund for Colorado and the Colorado Teamsters Construction Workers Local No. 13 Vacation Fund — are "Taft-Hartley trusts," having been established and maintained under the terms of Section 302 of the Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §186. These trusts, whose respective purposes can be divined from their names, are therefore jointly administered by representatives of labor and of management. The Construction Advancement Program and the Industry Advancement Program are industry promotion funds, the trustees of which are all selected by management only.

Hawg executed the Union agreement, which neither of the corporate principals had read, on May 1, 1977. The motivation for doing so was to obtain the services of one Martin, a Teamster member, whose union-negotiated fringe benefits would be lost or jeopardized by employment with a non-signatory employer. To this end, Lint[1] and Legried, Hawg's officers and principals, dele-

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[1]Lint, who appeared as "Lint" throughout the proceedings below, is denominated "Lindt" in the Petition; references to "Lindt" in the Petition and to "Lint" in this Brief are to the same individual.

gated to Martin the task of obtaining from the Union the necessary "paperwork" to ensure the continuation of Martin's fringe benefits. Martin called the Union several times, asking for a contract, and declining, on Hawg's behalf, the offer of a visit from a Union business agent. At this time, Lint and Legried contemplated that the requested contract would apply only to Martin; although it was their practice to use subcontractors and others, whom they described as "independent contract haulers," to perform work on Hawg's excavation contracts, they were unaware that the Union agreement contained terms restricting this practice. Martin, however, never communicated to the Union Hawg's misconception of the contract's terms.

The collective bargaining agreement in effect between Hawg and the Union from May 1, 1977 to May 1, 1978 imposed a number of duties on Hawg with respect to the Trustees. Among these was the duty to pay contributions, at specified rates and on a monthly basis, for each hour of work done by each of Hawg's employees who performed labor of the kind described in the agreement ("covered employment"). Hawg partially performed this duty, although in an untimely fashion, as to both Martin and subsequent employees hired to drive Hawg's own equipment; the enforceability of this obligation is not in question here. The failure of Lint and Legried to read the agreement, however, left them in ignorance of other provisions affecting Hawg's obligations to the Trustees. These provisions, Article 18 — the "Subcontractor Clause" — and Article 25 — the "Truck Rental Clause" — are fully set out in the Petition at pages 4-6, but they will be briefly summarized here.

The Subcontractor Clause obligated Hawg, if it chose to subcontract work calling for covered employment to another subcontractor, to require that subcontractor to sign an agreement with the Union, which agreement would in turn require payments to the Trustees by the subcontractor for each hour of covered employment performed by his employees on the subcontracted work. The Truck Rental Clause dealt with those instances in

which Hawg rented or leased from one owner not more than two units of equipment, fully manned and operated. On such occasions, under this provision, Hawg was to treat the drivers of these units ("owner-operators"), not as independent contractors, but as employees. The contract language outlines with specificity Hawg's duties to these individuals, including, among others, the duty to pay them hourly wages, the duty to make all applicable payroll deductions from their wages, and, for each hour of covered employment performed by them, the duty to pay contributions to the Trustees. It is undisputed that Hawg failed to comply with either the Subcontractor Clause or the Truck Rental Clause, although it used the services of both subcontractors and owner-operators in the performance of covered employment on its excavation contracts.

In approximately October, 1977, Hawg ceased making contributions to the Trustees. Several demand letters failed to elicit a response from Hawg. Then the Trustees sought and obtained an audit of Hawg's records, which disclosed that covered employment had been performed on Hawg's projects by owner-operators and by employees of non-signatory subcontractors. When Hawg denied liability, the Trustees filed suit in the United States District Court for the District of Colorado on July 25, 1978. Jurisdiction was based on 29 U.S.C. §185. A trial to the Court resulted in judgment in the Trustees' favor. The judgment consisted of the following elements: (a) Contributions, computed by multiplying the applicable hourly rates by the number of hours of covered employment which were performed by Hawg's employees but were not reported by Hawg;[2] (b) Contributions, computed by multiplying the applicable hourly rates by the number of hours of

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[2]The funds' trust agreements, to which the signatory employer becomes bound by execution of the Union agreement, require that the monthly payment of contributions be accompanied by a reporting form, showing the name of each affected employee and the number of hours each spent in the performance of covered employment during the month in question.

covered employment performed by employees of Hawg's non-signatory subcontractors on Hawg's projects; (c) Contributions, computed by multiplying the applicable hourly rates by the number of hours of covered employment performed by owner-operators on Hawg's projects; (d) Liquidated damages, assessed for each failure to report, in timely fashion, contributions due to the Trustees;[2] (e) Audit fees; (f) Attorney's fees; and (g) Costs. Hawg appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment.

SUMMARY OF ARGUMENT

I. The remedy granted the Trustees by the courts below for Hawg's breach of Article 18, the Subcontractor Clause — restoration to the position they would have attained had the breach not occurred — conforms to well-established principles of contract law.

II. Hawg's acknowledged failure to treat its owner-operators as employees, in violation of Article 25, the Truck Rental Clause, properly resulted in the Trustees' recovery of the amount which they would have received had Hawg employed the owner-operators directly.

III. This cause should not be reviewed by this Court, since the decision of the Tenth Circuit presents no conflict with state or federal decisions, no departure from the accepted and usual course of judicial proceedings, nor any question of federal law not already settled by this Court.

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[2]The trust agreements also impose liquidated damages if the report is not received by a specified deliquency date. During the twelve-month term of Hawg's contract, it filed four reports (for the months of May through August, 1977), none of which were received by the delinquency date.

ARGUMENT

I. THE TRUSTEES HAVE A RIGHT TO RECOVER DAMAGES FOR HAWG'S ADMITTED BREACH OF THE SUBCONTRACTOR CLAUSE, AND THE COURTS BELOW CORRECTLY DETERMINED THE MEASURE OF DAMAGES RECOVERABLE BY THEM.

The Subcontractor Clause is binding and valid upon its face, and it was properly enforced by the courts below. While not asserting any claim of invalidity or illegality, Hawg nevertheless argues that the clause in question should not have been enforced. The grounds for this argument are difficult to discern.

The execution of the contract was certainly voluntary, in the fullest sense of the word. Hawg, through Martin, solicited the agreement. There is no question of Union coercion, or even pressure — Martin had to make several calls to the Union before the contract was sent to Hawg. No issue of Union misrepresentation appears here — the only contacts between Hawg and the Union were Martin's phone calls to a secretary at the Union Hall (Martin, on Hawg's instructions, having refused a visit from a business agent). Nor can the Union be said to have acquiesced in Hawg's mistaken belief that the contract would apply only to Martin and his successors; for, as the trier of fact made explicitly clear, that belief was never communicated to the Union. Judgment of the District Court, Pet. A-3. That the work for which contributions are claimed was within the scope of the work described in the agreement and was therefore covered employment as previously defined herein, has never been challenged. Finally, assuming that ignorance could be relied upon to relieve a corporation from obligations assumed for it by its fully authorized, mentally competent, English-speaking principals, such reliance would be misplaced in this case. Legried, Hawg's vice-president, had the contract in his possession for a week before signing it and returning it to the Union — sufficient time, surely, for him to have read the agreement and, if necessary, to have sought advice regarding the consequences of entering into it.

Lacking the factual base for any of the foregoing arguments, Hawg argues, in effect, that the Subcontractor Clause is of no legal force. Although it is undisputed that Hawg breached this portion of the agreement, Hawg claims that it should not be called upon to respond in damages for doing so; rather, it should be allowed to breach this clause with impunity. Hawg goes so far as to characterize the Court's enforcement of the Subcontractor Clause as an "enlargement" or "reconstruction" of the contract in the Trustees' favor.

In truth, the Courts below made the following simple analysis. In executing the collective bargaining agreement, Hawg (whether its principals realized it or not) agreed to require each of its subcontractors to sign a written agreement to pay contributions to the Trustees. Had Hawg done what it agreed to do, the Trustees (on behalf of the beneficiaries of the respective trust funds) would have received (a) contributions from Hawg's subcontractors, or (b) a direct right to sue any subcontractor which failed to make the contributions. Hawg breached its agreement, and as a result, the Trustees have neither the contributions nor the right to sue defaulting subcontractors. The judgment of the District Court, insofar as it enforces the Subcontractor Clause, merely restores the Trustees to the position they would have enjoyed had the breaches not occurred. This measure of damages conforms to long-established principles of contract law. *A to Z Rental, Inc. v. Wilson,* 413 F.2d 899 (10th Cir. 1969); 5 Corbin, *Contracts,* §§ 990, 992 (1950 and Supp. 1980).

The suggestion that Article 28 of the contract, "Trust Fund Delinquencies," (set forth at pages 6-7 of the Petition) provided the Trustees with an adequate remedy is untenable. That article allows the Union to refuse to furnish workmen to a delinquent employer, to direct the employees of a delinquent employer to cease working for the employer, and to impose upon a delinquent employer economic or other legal sanctions. First, the Union never furnished workmen to Hawg, for the simple reason that Hawg never utilized the Union's hiring hall. Admittedly, the

Union did not direct Hawg's employees to cease working, nor did it attempt to impose economic or other sanctions upon Hawg. Assuming, however, that the Union was even aware of Hawg's breaches, the effectiveness of the Union's use of either of these alternatives is entirely speculative. Assuming further that the Union had put one or both of these options into use, without, in the process, collecting contributions for hours already worked by subcontractors' employees, the effect, if any, would have been purely prospective — the Trustees' future damages might have been mitigated, but the Trustees would not have been made whole for Hawg's past breaches. Finally, perhaps the most elementary of all the flaws in this argument: this "remedy," if remedy it is, is completely beyond the control of the Trustees. The options provided in Article 28 are the *Union's* options.

Although Union-appointed trustees participate equally with management-appointed trustees in the administration of the two Taft-Hartley trust funds involved in this dispute (while participating not at all in the management of the industry promotion funds), the Union and the trust funds are, in law and in fact, separate entities. *See, Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). The Trustees could not exercise the powers which Article 28 of the contract bestowed exclusively upon the Union, nor could the Trustees require the Union to exercise those powers; nor, as noted above, could Union action have achieved more than a prospective or mitigating effect. The Trustees respectfully submit, therefore, that the measure of damages determined by the District Court, namely, that which would restore the Trustees to the position they would have attained absent the breach, was the correct and appropriate one.

II. HAWG'S TREATMENT OF OWNER-OPERATORS AS INDEPENDENT CONTRACTORS RATHER THAN EMPLOYEES IS NOT A DEFENSE TO THE TRUSTEES' CLAIMS UNDER THE TRUCK

RENTAL CLAUSE, BUT AN ADMISSION OF HAWG'S BREACH, FOR WHICH THE TRUSTEES ARE ENTITLED TO RECOVERY.

Hawg's objection to the enforcement of the Truck Rental Clause seems to rest on its conviction that its owner-operators were not employees, but independent contractors. Neither the District Court nor the Court of Appeals attempted to characterize the owner-operators as employees or as independent contractors because, as the Tenth Circuit's opinion in this matter puts it, "[s]uch characterization is not determinative of the problem." Pet. B-8. Rather, both Courts found the contractual provision itself to be determinative of the problem. That provision required Hawg to treat the owner-operators who did covered work as employees, in all respects. Hawg was contractually obligated not only to pay fringe benefits on behalf of these owner-operators, but to put them on its payroll at Union scale and to withhold all applicable payroll deductions. Having breached its agreement in failing to follow these procedures, Hawg now puts forth the circular argument that the owner-operators were independent contractors, apparently not recognizing that this characterization is an admission of the very breach for which the Trustees are seeking a remedy.

The United States Court of Appeals for the Ninth Circuit rejected a similar argument in *Waggoner v. Northwest Excavating, Inc.*, 642 F.2d 333 (1981). In that case, trustees of employee benefit funds sued an employer, Northwest, which was signatory to a collective bargaining agreement containing two restrictions on subcontracting. One clause required that owner-operators become bona fide employees of the employer; the second required that equipment maintenance be done only by employees "covered by" the agreement. The trustees sued to enforce both clauses.

Northwest, unlike Hawg, was a broker; that is, its primary business was the rental of manned equipment to contractors in the construction industry. When Northwest was unable to supply its own equipment, manned by its own employees, it would refer an

independent owner-operator to the contractor; Northwest would then bill the contractor for the services performed by the owner-operator, deduct a brokerage commission from the payment, and remit the remainder to the owner-operator. The Court found the owner-operators to be independent contractors; this finding, however, was not the basis on which the Court relieved Northwest of liability. Instead, as a matter of contract interpretation, the Court held that the persons responsible, under the agreement, for employing and paying fringe benefit contributions on the owner-operators, were the contractors which utilized their services, rather than the broker which merely dispatched them. Thus, had the trustees in the Northwest case sued a signatory contractor for fringe benefits claimed for work by owner-operators on the contractor's own jobs, they presumably would have prevailed, despite the owner-operators' status as independent contractors.

The other relevant issue in *Northwest, supra*, involved the contractual requirement that maintenance work be done only by covered employees. Despite this requirement, Northwest had its equipment maintained by an independent contractor and his employees. The Court quite appropriately found that Northwest had breached its contract in so doing, and awarded the trustees damages in an amount equal to that which they would have received had Northwest complied with the contract by employing the maintenance workers directly. Thus, despite Hawg's reliance on *Northwest*, the results reached by the Ninth Circuit are entirely consistent with the conclusions of the Tenth Circuit in this case.

III. THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT.

The Petitioner has failed to adduce any reason why this Court should exercise its discretion to review this matter further. Both the District Court and the Court of Appeals applied well-established principles of contract law which are fully in accord with decisions of other federal courts of appeals. The Truck Rental Clause in Hawg's agreement bears a marked resemblance

to both of the provisions under scrutiny in *Waggoner v. Northwest Excavating, Inc.*, 642 F.2d 333 (9th Cir. 1981). And the opinion in that case, though cited by Hawg, demonstrates judicial reasoning exactly parallel to that of the courts below in the interpretation of substantially similar contractual terms.

Nor can Hawg point to any conflict between the opinion below and any decision of this Court. Rather, Hawg's characterization of the lower courts' enforcement of the Subcontractor Clause as an "enlargement" of Hawg's obligations under the contract flies in the face of this Court's decision in *Walsh v. Schlecht*, 429 U.S. 401 (1977). The only difference, for purposes of this analysis,[4] between the subcontractor clause enforced in *Walsh* and that contained in Hawg's Union agreement is, as pointed out in the Tenth Circuit opinion in this matter,

> that the bargaining agreement in *Walsh* did specifically provide that the signatory employer was liable if the subcontractor did not make the payments. . . . The absence of such a clause, however, in our view, is not fatal. The agreement did specifically provide that Hawg should *require* the subcontractor to sign an agreement with the Union to make payments into the various employer-union trust funds. Hawg breached this provision in the agreement, and is now simply called upon to respond in damages for its breach. The relevance of *Walsh* to the instant controversy is that Hawg may not avoid the agreement merely because the subcontractor's employees will not benefit by Hawg's payments measured by the hours worked by the subcontractor's employees. *See also*

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[4]An ambiguity in the *Walsh* contract provided the major issue in that case, namely, whether the contributions required were to benefit employees of non-signatory subcontractors, in which event the provision would be illegal under 29 U.S.C. §186, or if, as the Court found, the contributions were to be measured by the hours worked by such employees. That issue is not present here.

Kreindler v. Clarise Sportswear Co., 184 F.Supp. 182, 184 (S.D.N.Y. 1960). [Emphasis and citation by the court].

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Hawg's final argument, in support of which it cites the dissent in *Walsh*, *supra*, is that Hawg derived no economic advantage from breaching the agreement. Of course, the Trustees asserted their claims for breach of contract based on losses they had incurred, not on gains which Hawg might have enjoyed. Be that as it may, however, Hawg could have avoided the "substantially increased, unrecoverable cost" (Pet. 10) it claims will result from the decisions below in any one of several ways. It could, for instance, have declined to enter into the Union contract. Or, having executed the contract, it might have complied with the Subcontractor Clause, thus shifting to its subcontractors the burden of paying fringe benefits on their employees. It might also have fulfilled its promises under the Truck Rental Clause, adding the cost of fringe benefit contributions into its bid. That Hawg exercised none of these options is a direct result of its ignorance of the contract's terms, which, in turn, is solely the product of Hawg's own negligence. This set of facts does not warrant the exercise of jurisdiction by this Court.

In sum, Hawg has failed to show that the courts below departed from established principles of law, as enunciated by other courts of appeals or by this Court, or from accepted judicial proceedings; nor has Hawg established any other special or important reason for the granting of a writ of certiorari.

CONCLUSION

For the reasons stated herein, supported by the foregoing arguments and authorities, the Trustees respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

/s/ John S. Pfeiffer
John S. Pfeiffer
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1200 American National Bank Bldg.
818 Seventeenth Street
Denver, Colorado 80202
(303) 534-1200

Attorneys for Respondents